United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

To be Argued by
JOSEPH I. STONE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

77-1249, 1252, 1253

B
P/S

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UNITED STATES OF AMERICA,
Appellee,
-v-

IRMA ANES,

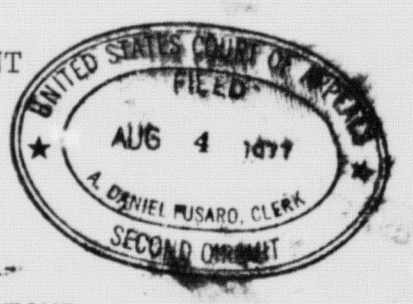
Defendant-Appellant.
----------X

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLANT

IRMA ANES



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PRELIMINARY STATEMENT

The appellant, Irma Anes, appeals from a judgment of the United States District Court, Southern District of New York, before Hon. Milton Pollack, U.S.D.J., and a jury, of the crime of conspiracy to violate Title 18, U.S.C., Section 287, and three substantive violations (filing false, fictitious or fraudulent claims.) The appellant was sentenced on January 17, 1977, to a fine of $1500 and one year probation. The fine has not been paid pending determination of this appeal. The undersigned was assigned as attorney for appellate purposes by order of this court dated May 31, 1977.

STATEMENT OF FACTS

The defendant-appellant Irma Anes was tried with four other co-defendants (now co-appellants) in the trial before Hon. Milton Pollack which began November 29, 1976, and ended on December 6, 1976.

The defendant-appellant Anes was represented on trial by Ernest H. Hammer, Esq., 225 Broadway, New York, New York, who also represented co-defendants Buigues and Puig. There is no indication in the trial record concerning Mr. Hammer's "conflict of representation." However,

it is conceded that prior to trial, Judge Pollack conducted a hearing as to the possible conflict of interests between Ms. Anes and co-defendants Buigues and Puig. I am informed by Ms. Anes that at that time she did not feel there was a conflict of interest and signed a waiver of that issue.

Prior to trial, and there is no indication that Irma Anes was aware of this at the time she filed her waiver as to the conflict, the government informed the court that one or two of the defendants would be charged with threatening a government witness. The two defendants who were charged were the defendant Puig (287, 288R) and the defendant Buigues. At the time this evidence was received by witness Edward Rogers, the judge properly instructed the jury that Mr. Rogers' testimony was solely against the defendant Puig (289R). Motions by all attorneys for a severance were made and denied by the trial judge. However, no further inquiries were made as to whether the conflict of interest between Mr. Hammer, Anes, Puig and Buigues deteriorated because of the testimony offered by Rogers.

This conflict became more apparent and more prejudicial to Anes when Mr. Hammer, in his re-cross examination of Mr. Rogers, brought Mr. Buigues into the

picture (344, 346R). Even after this cross examination which was harmful to Buigues and more harmful to Anes, the waiver as to the conflict was not brought up by either the court, Mr. Hammer or the Assistant United States Attorney.

The government's case consisted of certain exhibits signed by the defendant-appellant Anes requesting money from the Department of Agriculture. There was no dispute that she signed these vouchers and the extensive recitation of the total fact pattern will be left to the other attorneys representing their respective appellants and will not be repeated here. The additional testimony against appellant Anes was offered by Mr. Isaac Nole Robles, who testified that he was the executive director of "Querer, Inc." and Ms. Anes was employed full time as an administrative assistant from November, 1973, until March of 1976 (445, 446R). He also testified that her sign-in sheets indicated that she worked during the same period of time that she collected money from the "Youth in Government" program. Her cancelled checks were also offered as evidence against her. None of the testimony offered by Robles was disputed when Ms. Anes took the stand. There was additional testimony offered against Puig and Buigues which seriously prejudiced Ms. Anes and highlighted the conflict of interest. Carl Bogen,

a criminal investigator with the United States Attorney's office, testified concerning the post-arrest interview of Angelo Puig (495, 499R). Mr. Puig's post-arrest statement, admitted over objection, indicated that Ms. Anes "was a girlfriend of Mr. Buigues and employed at his request." Mr. Angelo Melonas, an agent of the Federal Bureau of Investigation, testified too about a very serious part of the government's evidence when co-defendant Sammarco's post-arrest statement was introduced claiming that Mr. Buigues"wanted cash".

Mr. Hammer called Paul Masselli as a witness for the defendants. However, all questions were to benefit Ms. Horowitz and Mr. Buigues while the cross examination as to an alleged twenty thousand dollar kickback was detrimental to Mr. Buigues (647R). The record clearly indicates that prior to this arrest, Ms. Anes had never been involved in any legal proceedings. Yet her attorney called no character witnesses. This, by itself, could be listed as a trial tactic. However, three character witnesses were called for Mr. Buigues, including Mr. Eligu Hill. The government asked Mr. Hill whether Mr. Buigues had a mistress (671). The court sustained the objection but this further accentuated the conflict of interest

when one lawyer represents more than one defendant in a conspiracy case. This is especially true when character witnesses were called for one defendant but not the other.

Ms. Anes testified in her own defense and was cross examined about being Mr. Buigues' girlfriend and having a child by him (747R). Mr. Buigues also testified in his own defense. His direct testimony accentuated the relationship between him and Irma Anes (997R). He was asked whether he received any of Ms. Anes' salary and whether or not he resided with her (1016, 1017R). Cross examination of Buigues accentuated the alleged assault and threats by him (Buigues) against Rogers (1033R). Even though the court limited these questions as against Buigues, we now have the assault and threat allegations against two out of the three defendants represented by Mr. Hammer.

The government, in their summation, emphasized the relationship between Buigues and Anes as a motive for Buigues to commit this crime (1096, 1097R), and claimed that Anes "had been programed" concerning some of her testimony. This leaves the impression that she was programed either by co-defendant Buigues, or her attorney, Mr. Hammer who represented both defendants. The government's summation was improper in reference to Mr. Hammer's remarks about Ms. Anes when he refered that there was

no evidence concerning any item she had prepared (1192, 1193R).

Although Mr. Hammer tried the best he could to defeat the government's overall allegations of a conspiracy, he could not differentiate in his summation between Buigues and Puig, who were the directors of "Youth in Government" and Ms. Anes, who was no more than a bookkeeper.

QEUSTION PRESENTED

1. WAS THE ATTORNEY-CLIENT MULTI-DEFENDANT CONFLICT SO APPARENT AS TO DEPRIVE IRMA ANES OF A FAIR TRIAL?
2. APPELLANT ADOPTS ARGUMENTS OF ALL CO-APPELLANTS.

ARGUMENT

POINT I

This court has dealt at length with the conflict of interest situation where one attorney represents more than one defendant. According to the defendant-appellant, Judge Pollack was exceptionally careful (prior to trial) in ascertaining whether or not the conflict of interest was present. The conflict of interest situation was decided before the defendant-appellant Anes was aware that

two of her co-defendants represented by the same counsel would be charged with "obstructing justice" and threatening a government witness. After this fact was made known (during the trial) no additional inquiry was made concerning the conflict of interest. In U.S. v. DeBerry, 487 F 2d 448, Judge Oakes decided, "The rule in this circuit is that some specific instance of prejudice, some real conflict of interest, resulting from a joint representation must be shown to exist before it can be said that an appellant has been denied the effective assistance of counsel," citing U.S. v. Lovano, 420 F 2d 769.

It is conceded that where no prejudice is shown, joint representation is permitted even though not desirable, U.S. v. Alberti, 470 F 2d 881.

The hearing to determine whether a conflict exists should be held as soon as the court becomes aware of this potential conflict. This obligation upon the court and the assistant United States Attorney continues through each and every phase of the trial and it's not dissipated after the original hearing.

It is my understanding that prior to trial co-defendant Buigues indicated that he alone was going to pay the legal fees and that Ms. Anes did not have any

money and wanted to retain the same lawyer. This identical situation arose in DeBerry, supra, when on page 454 the court stated, "If he is indigent, counsel can be assigned to him under the U.S.C.J.A., 18 U.S.C., Section 3006(a). The Sixth Amendment of the United States Constitution guarantees to a defendant the right to be adequately represented, and shifts the burden of proof on the question of prejudice to the government."

The American Bar Association, in the A.B.A. standards relating to the prosecution function and the defense function, stated:

> "Except for preliminary matters such as initial hearings or applications for bail, a lawyer or lawyers who are associated in practice should not undertake to defend more than one defendant in the same criminal case if the duty to one of the defendants may conflict with the duty to another. The potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to act for more than one of the several co-defendants except in unusual situations when, after careful investigation, it is clear that no conflict is likely to develop and when the several defendants give an informed consent to such multiple representation."

POINT II

This court had additional opportunity to comment on joint representation in U.S. v. Mari, 526 F 2d 117, when the court compared the rule in this Circuit with

that of the District of Columbia and the Third Circuit. There it was stated that joint dual representation "should be only after the most searching inquiry on the part of the court, and in those exceptional circumstances where conflict is not in the realms of reasonable forseability." The court, in Mari, supra, further stated, "Trial court insistance that, except in extraordinary circumstances, co-defendants retain separate counsel will in the long run -- prove salutary not only to the administration of justice and the appearance of justice, but the cost of justice," citing U.S. v. Olsen, 453 F 2d 612. The court, in Mari, further made it very clear that if there were a conflict that first did not appear and subsequently arises on or before trial, it would still allow the defendant-appellant to present this issue to the Appellate Court.

CONCLUSION

The exceptional circumstances of dual representation were borne out by the record. Accordingly, the judgment of conviction should be reversed and a new trial ordered.

Respectfully submitted,

JOSEPH I. STONE
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-v-

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AFFIDAVIT OF SERVICE

77-1249, 1252, 1253

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS.:

MARIE CLAUSI being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at 90 Bay 28th Street, Brooklyn, New York.

THAT on August 2, 1977 deponent served the within Appellant's Brief upon Robert Fiske, Esq., United States Attorney, Southern District of New York, One St. Andrew's Plaza, New York, New York, the address designated by said attorney for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Marie Clausi
MARIE CLAUSI

Sworn to before me, this
2nd day of August, 1977.

JOSEPH L. ITOM
NOTARY PUBLIC, State of New York
No. 24-6301857
Qualified in Nassau County
Commission Expires March 30, 1979

Notary Public